No. 90-889

In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM "SKY" KING, PETITIONER

v.

ST. VINCENT'S HOSPITAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

	Page
Cases:	
Ellermets v. *Department of the Army*, 916 F.2d 702 (Fed. Cir. 1990)	3, 4
Kolkhorst v. *Tilghman*, 897 F.2d 1282 (4th Cir. 1990), petition for cert. pending, No. 89-1949	1, 2
Statute:	
38 U.S.C. 2024(d)	1, 2, 3, 4

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1. Respondent argues that the court of appeals' decision is not in conflict with the Fourth Circuit's decision in *Kolkhorst* v. *Tilghman*, 897 F.2d 1282 (1990), petition for cert. pending, No. 89-1949, because "[t]he Eleventh Circuit would reach the same decision in *Kolkhorst* as did the Fourth Circuit," and the Fourth Circuit, if called upon to decide the instant case, might not decide it differently. Br. in Opp. 2-6, 8. Thus, respondent contends that this Court should deny review because in neither case would the outcome necessarily depend on the circuit in which the case was decided.

We disagree. In the wake of *Kolkhorst*, we believe the Fourth Circuit would be bound to rule that 38 U.S.C. 2024(d) of the Veterans' Reemployment Rights Act protects the reemployment rights of reservists in petitioner's posi-

tion. The Fourth Circuit stated categorically in *Kolkhorst* that there is no requirement under Section 2024(d) that a leave request be "reasonable." 897 F.2d at 1286. That statement was not confined to the particular circumstances in *Kolkhorst*, nor was it qualified by any limitation based on the duration of the leave. In order to rule against a reservist in petitioner's situation, the Fourth Circuit would have to reject its interpretation of Section 2024(d) in *Kolkhorst*. Thus, there is a conflict among the circuits that warrants this Court's review.

With respect to respondent's suggestion that the outcome in *Kolkhorst* might be the same in the court below as in the Fourth Circuit, we believe the court of appeals' discussion of reasonableness in the instant case makes it impossible to predict how that court would rule on the Section 2024(d) issue presented in *Kolkhorst*. If anything, however, this uncertainty is a further reason to grant the petition. As discussed in the petition, at 8, 18, the difficulty of determining whether a given reservist will be found entitled to Section 2024(d) protection under the reasonableness tests formulated by the Eleventh Circuit in this case, and by the Third and Fifth Circuits in other cases, is due to the inherent vagueness of that standard. Moreover, not only do the Fourth and Eleventh Circuits disagree over whether there is any reasonableness test at all, but there is also disagreement among the courts of appeals on how reasonableness is to be evaluated. See Pet. 18. This disarray in the law, by "generat[ing] uncertainty among employers and potential recruits," defeats the central purpose of the reemployment rights provision: to provide an incentive for reserve service by insuring "economic security to those who serve in the reserves." Pet. 8.[1]

[1] Respondent implies that *Kolkhorst* did not present the issue of whether Section 2024(d) imposes a reasonableness requirement because, in denying Kolkhorst's request to go on leave to train with his reserve unit once the employer's quota had been met, the employer "[did] not even consider the reasonableness of [that] employee's request." Br. in Opp. 5.

The flaw in this argument is that it rests on the assumption that "reasonableness" must be assessed by looking, in isolation, at the individual circumstances of a reservist's leave request and the impact of that reservist's service obligations on the employer. But, if there is to be a reasonableness test, it is hard to see why it must focus solely on the individual employee. Rather, the reasonableness of an employee's request might be evaluated in terms of the incremental effect on the employer of that employee's training duty obligations, in light of the burden simultaneously imposed by the reserve obligations of other employees.

2. Based on what respondent describes as a "handful" of cases, it asserts that "extended leaves under 2024(d) are uncommon and do not play a major role in reserve service." Br. in Opp. 9. That statement could not be further from the truth. At last count, there were more than 45,000 reservists on tours of "active duty for training" requiring at least 180 days of service. See Pet. 8 n.6. The importance of these reservists is, if anything, greater than their considerable numbers would indicate. Many fill key positions as full-time support personnel assigned to train reserve units and administer the reserve program; others engage in specialized training to develop skills essential to the effectiveness and readiness of the total fighting force. See Pet. 15-16. By raising doubts about the reemployment rights of these reservists, the decision below threatens to undermine recruitment efforts and disrupt the operation of the reserve programs. The government therefore has a strong interest in review of this case.

3. Respondent errs in suggesting (Br. in Opp. 7 n.10) that, in *Ellermets* v. *Department of the Army*, 916 F.2d 702 (Fed. Cir. 1990), the Department of the Army has "take[n] a different view" of the proper interpretation of Section 2024(d). In that case, a civilian employee of the Army

Corps of Engineers left his job for reserve duty *before* informing his superiors of his need for leave. 916 F.2d at 705. The court held that, under those circumstances, the employer could deny him a leave of absence under Section 2024(d).

The question presented in *Ellermets* was whether an employer is required to grant a leave of absence for reserve service if the reservist fails to make the request before he departs for duty. The court of appeals' negative answer is entirely consistent with the government's position in this case. In the present petition, the government acknowledged that one of the requirements imposed by Section 2024(d) is that the employee "request" a leave of absence from the employer. See Pet. 14. One who fails to inform his employer of the need for leave until after the leave has begun can hardly be viewed as having complied with the statutory requirement to make a "request." Thus, the question whether an employee has given timely notice of his need for leave – the question presented in *Ellermets* – is analytically distinct from the question presented here.[2]

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JANUARY 1991

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[2] A requirement of timely notice – of a "request" – can serve important purposes even if an employer may not refuse on the ground that the request is "unreasonable." It allows an employer to take some advance action to compensate for the employee's absence and, in some instances, to see whether the employee himself can make alternative arrangements.

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